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In the Supreme Court of the United States

OCTOBER TERM, 1984

ASSOCIATION OF CALIFORNIA WATER AGENCIES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

COUNTY OF DEL NORTE, CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether alleged procedural irregularities in the timing of the Secretary of the Interior's designation of parts of five northern California rivers as components of the national Wild and Scenic Rivers System required setting aside the designation notwithstanding petitioners' inability to demonstrate any prejudice flowing from the alleged irregularities.

2. Whether the Secretary of the Interior correctly determined that the State of California would be able to "permanently administer[]" the rivers as wild, scenic, or recreational, as required by the Wild and Scenic Rivers Act, 16 U.S.C. 1273(a)(ii).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10)[1] is reported at 732 F.2d 1462. The opinion of the district court (Pet. App. A21-A34) is not reported.

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[1]"Pet. App." refers to the appendix to the petition in No. 84-544.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1984. A petition for rehearing was denied on July 5, 1984 (Pet. App. A11). The petition for a writ of certiorari in No. 84-544 was filed on October 2, 1984, and the petition for a writ of certiorari in No. 84-553 was filed on October 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge by several California counties and entities representing timber and water development interests to the Secretary of the Interior's designation of portions of five northern California rivers as components of the national Wild and Scenic Rivers System.

1. a. In 1968, Congress enacted the Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*, declaring "that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations" (16 U.S.C. 1271). To preserve these rivers in their natural free-flowing condition, the Act forbids any department or agency of the United States from assisting "in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established" (16 U.S.C. 1278(a)). The Act also directs the heads of all federal agencies to "take such action * * * as may be necessary to protect such rivers in accordance with the purposes of [the Act] * * *. Particular attention shall be given to scheduled timber harvesting, road construction, and similar activities which might be contrary to the purposes of [the Act]" (16 U.S.C. 1283(a)). In establishing this protective scheme, Congress expressed

its commitment to the principle that "just as the Nation has set aside some of its land areas in national parks, national monuments, national historic sites, and the like, so some of its streams which have exceptional values * * * — scenic, recreational, esthetic, and scientific — ought to be preserved for public use and enjoyment." H.R. Rep. 1623, 90th Cong., 2d Sess. 3 (1968).

Rivers may be designated as part of the system in two ways. Section 2(a)(i) of the Act, 16 U.S.C. 1273(a)(i), provides that Congress may designate rivers for inclusion in the system. Alternatively, Section 2(a)(ii) of the Act, 16 U.S.C. 1273(a)(ii), authorizes the Secretary of the Interior to designate rivers for inclusion in the system. Before the Secretary may designate a river under Section 2(a)(ii), he must find that (1) the river has been designated by the state legislature as wild, scenic, or recreational; (2) the river is to be "permanently administered" as wild, scenic, or recreational "by an agency or political subdivision of the State"; and (3) the river meets the criteria set forth in the Act for classification as wild, scenic, or recreational "and such criteria supplementary thereto as [the Secretary] may prescribe" (16 U.S.C. 1273(a)(ii)).

b. In 1972, the California legislature, at the request of the Governor of California, gave state protection to five northern California rivers. Cal. Pub. Res. Code § 5093.54 (West Supp. 1984). By designating these rivers as wild, scenic, or recreational, the California legislature expressed its intent that they "shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state." Cal. Pub. Res. Code § 5093.50. In order that the preservation mandate might be fulfilled, the California legislature imposed a number of permanent protective restrictions on the rivers. The legislature undertook to maintain the free-flowing character and outstanding anadromous fishery values of the

rivers by prohibiting all dams, reservoirs, diversions, and other water impoundment facilities. Cal. Pub. Res. Code § 5093.55. The legislature also enacted a "consistency clause" under which all state and local agencies are required to exercise their powers "in a manner consistent with the provisions" of the state statute. Cal. Pub. Res. Code § 5093.61. By taking this action, the legislature guaranteed that the full panoply of state environmental laws (*e.g.*, California Coastal Act, California Environmental Quality Act, California Forest Practices Act, Porter-Cologne Water Quality Act) would be applied by each state and local agency to preserve the wild, scenic, and recreational characteristics of these rivers.

On July 18, 1980, the Governor of California filed an application to place 4,006 river miles of these five rivers in the federal Wild and Scenic Rivers System. On August 1, 1980, the Secretary of the Interior acknowledged receipt of the Governor's application and indicated that it would have to be supported by, among other things, "a practical plan which meets criteria of the [federal] Wild and Scenic Rivers Act for protection and administration of each of the rivers and their related land resources * * *." DX 16, at 1. To fulfill this requirement, the State submitted an extensive report, over 100 pages long, that explained in detail the administrative capabilities of California's state and local agencies. In this document, the State explained how it would satisfy the federal requirement (16 U.S.C. 1273(a)(ii)) that the rivers be "permanently administered" as wild, scenic, or recreational.

2. On December 5, 1980, Judge Fred W. Marler, Jr. of the State Superior Court for Sacramento County issued a memorandum opinion in *County of Del Norte* v. *Brown*, No. 292019 (Pet. App. A182-A189). In that lawsuit, several California counties and California water interests — including some of the petitioners here — challenged the authority

of the Governor to submit the Section 2(a)(ii) application prior to the approval of river management plans by the California legislature. Judge Marler denied the plaintiffs' request to require the Governor to withdraw the Section 2(a)(ii) application, concluding that state law did not bar the Governor from submitting an application and that whether the rivers should be included in the federal system was a question of federal law (Pet. App. A186-A187). Although he refused to order the Governor to withdraw the application, Judge Marler wrote in dictum that, in the absence of legislatively-approved management plans, neither the Governor nor the State Resources Secretary had authority under state law to commit the State to permanently administer the rivers under the state wild and scenic rivers statute (*id.* at A186, A188). Recognizing that his interpretation on this point could in no way affect the Secretary's determination as to whether or not California's application met the federal standards of Section 2(a)(ii), Judge Marler qualified his dictum by emphasizing that "it is then the province of the Secretary of the Interior to find in accordance with the Court's interpretation of the California Act whether federal requirements for inclusion of these rivers in the national system have been met" (Pet. App. A187).

Judge Marler's opinion was analyzed by Department of the Interior officials and presented to the Secretary in at least five decisionmaking documents. The significance of Judge Marler's dictum was summarized in an 18-page review of California's ability to permanently administer the five rivers that was submitted to the Secretary as part of the final decision making package. Evaluation of California's Ability to Permanently Administer State Protected Rivers in Conformance with Federal Wild & Scenic River Legislation (DX 36) [hereinafter cited as *Evaluation*]. In concluding that California had demonstrated its ability to satisfy the "permanent administration" requirement of federal law, the *Evaluation* stated (at 2 (emphasis in original)):

> In addition to reviewing those authorities which were addressed in the State Court decision, our analysis has also considered the corollary authorities which are set forth in the State application. * * * We have considered in our analysis the entire body of California law providing the Resources Agency and other State and local agencies authority for protecting the resource values of the rivers nominated. *Our analysis indicates that the State's program of action adequately protects the rivers' values.*

3. After determining that a Section 2(a)(ii) designation based on the State's application would constitute a "major Federal action[]" requiring preparation of an environmental impact statement (EIS) pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), the Department of the Interior began to prepare a draft EIS on the proposal. A draft EIS was issued on September 16, 1980, and ten public hearings were held to obtain comments on that document. On November 14, 1980, at the behest of some of the petitioners, the district court issued a temporary restraining order extending the comment period on the draft EIS. *County of Del Norte* v. *Andrus*, No. C-80-3964-WAI (N.D. Cal.). The order was dissolved on December 1, 1980, for lack of jurisdiction, and the comment period was closed on December 5, 1980 (resulting in a comment period more than a month longer than the 45 days required by the regulations of the Council on Environmental Quality (see 40 C.F.R. 1506.10(c)).

On Friday, December 12, 1980, an Interior employee filed the final EIS (FEIS) with the Environmental Protection Agency and signed an EPA form verifying that distribution of that document had been completed. Copies of the FEIS were available on that date at Interior's offices in San Francisco and Washington, D.C., as well as at EPA's offices in Washington, D.C. Full distribution of the FEIS was

completed on Monday, December 15. By Wednesday, December 17, copies of the FEIS were available in quantity to the public, and copies were obtained by petitioners' counsel on that date. Also on that date, EPA published a Notice of Availability of the FEIS in the Federal Register. 45 Fed. Reg. 83031 (1980). Interior relied on the December 17 publication date for purposes of calculating the 30-day waiting period for final agency action imposed by 40 C.F.R. 1506.10(b)(2).

4. After two preliminary versions of a Secretarial Issue Document (SID) were distributed for review within the Department of the Interior, the final SID was issued on January 16, 1981. Former Secretary Cecil D. Andrus signed the decision option sheet of the SID (which had been given to him several days before) on January 19, 1981.[2] The Secretary's decision designated only 1,235 of the 4,006 river miles the Governor had proposed for inclusion in the national system. (Petitioners' statement (84-544 Pet. 2) that 2,400 river miles were placed in the System is incorrect.) Nearly three-fourths of the river mileage listed in the State's application was denied inclusion based on the Secretary's determination that it did not qualify under the eligibility requirements of the federal Act.

5. In early 1981, two substantially similar suits were filed by timber interests and water development interests — petitioners here — seeking to invalidate the Secretary's designation. Petitioners alleged that the Secretary's designation was invalid because (1) the FEIS was inadequate; (2) Interior had failed to follow two Council on Environmental Quality (CEQ) regulations, 40 C.F.R. 1506.9 and 1506.10,

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[2]On January 15 and 16, 1981, respectively, the United States District Courts for the Districts of Oregon and Northern California had enjoined the decisionmaking process. These injunctions were vacated by the Ninth Circuit on January 19, 1981 (Pet. App. A80-A81).

relating to the timing of EISs; and (3) the Secretary acted arbitrarily and capriciously in concluding that California had the ability to permanently administer the rivers as wild, scenic, or recreational rivers. The State of California and a number of environmental organizations were granted leave to intervene as defendants.

On February 9, 1983, the district court ruled in favor of petitioners, holding, inter alia, that the Secretary's designation was defective because of procedural irregularities (Pet. App. A21-A34). The court's basic holding was that the Secretary's decision was a nullity because he was not authorized to reach a decision on January 19, 1981. CEQ regulations provide for a 30-day waiting period between publication of the Notice of Availability of the FEIS in the Federal Register and final agency action. 40 C.F.R. 1506.10(b)(2). It is undisputed that 33 days actually elapsed between publication of the Notice of Availability and the Secretary's decision. The district court ruled, however, that the December 17 Federal Register notice was invalid because the notice should not have been published until the week of December 22. Thus, according to the district court's reasoning, the Secretary was barred by the 30-day waiting requirement from taking any action on the Governor's recommendation until January 21, 1981 (when his successor had assumed office). Pet. App. A24-A25.[3]

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[3]The district court's ruling that the timing of the Federal Register notice was improper rested on the court's conclusion that certain preconditions for publication of a Notice of Availability had not been satisfied as of December 17. The court relied, first, on Section 1506.9 of the CEQ regulations, which states in pertinent part:

> Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public.

As previously noted, a copy of the Final EIS was filed with EPA on December 12. However, the district court concluded that copies of the FEIS were not "available" to the public within the meaning of 40 C.F.R.

In addition, the district court ruled that petitioners were entitled to summary judgment on the issue of whether the Secretary had acted arbitrarily and capriciously in concluding that California could "permanently administer" the designated rivers as wild, scenic, or recreational rivers (Pet. App. A28-A31). The court acknowledged that the question of permanent administration was a matter of federal law, that it was within the Secretary's discretion to determine the adequacy of the State's ability to comply with the permanent administration requirement, and that the state court opinion had been brought to the Secretary's attention by the Secretarial Issue Document (*id.* at A29, A31). Nevertheless, the court held that the "full import [of the state court decision] was not set forth, and secretarial consideration may thereby have been unduly limited" (*id.* at A31).

6. The court of appeals reversed (Pet. App. A1-A10). The court first held that "any violation of [CEQ's timing regulations, 40 C.F.R. 1506.9 and 1506.10] must be regarded as insignificant and within the scope of another portion of the same series of regulations which provides that trivial violations shall not form the basis for independent causes of

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1506.9 until the mailing of the Final EIS to all those on the Interior Department's mailing list was completed on December 15. Thus, according to the district court, the Final EIS was not effectively filed with EPA until December 15.

The district court also cited the following language from Section 1506.10 of the CEQ regulations:

> The Environmental Protection Agency shall publish a notice in the Federal Register each week of the environmental impact statements filed during the preceding week.

The district court ruled that this section creates a mandatory requirement that the EPA delay publication of the Federal Register notice until the week following the effective filing date. Since effective filing purportedly did not occur until December 15, the court concluded that publication of the Federal Register notice should have been delayed until the week of December 22.

action. 40 C.F.R. § 1500.3 (1983)" (Pet. App. A2-A3). At the outset, the court noted (*id.* at A2 (footnote omitted)):

> It is apparent from the record that the State of California, which originally proposed the designation, and the Heritage Conservation and Recreation Service (HCRS), the Department of the Interior division which processed the application, favored expeditious completion of all NEPA requirements so that action could be taken on the proposal before the Carter administration left office. It is equally apparent that those opposing designation, including [petitioners] in this case, wished to delay final consideration by the Secretary until the new President took office.

The court of appeals then reviewed the chronological facts relevant to the EIS process. These facts showed that "the agency followed all timing requirements for preparation of the EIS itself"; that the comment period on the draft EIS was substantially longer than required by CEQ's regulations; that the Notice of Availability of the FEIS was accurate when it appeared on December 17 because the FEIS was then available; and that more than the 30 days required by 40 C.F.R. 1506.10(b)(2) had passed when the Secretary designated the rivers on January 19, 1981 (Pet. App. A5). In light of these facts, the court of appeals concluded (*id.* at A7):

> The integrity of the decision making process within the government and the public's opportunity to comment in accordance with all legal requirements were not compromised in any way.

In addition, the court of appeals rejected the district court's conclusion that the Secretary had not been fully apprised of the state court decision that the rivers could not, under state law, be "permanently administered" as wild, scenic, or recreational. The court of appeals summarized its conclusion as follows (Pet. App. A10):

> Full review of the record reveals * * * that the [state court] decision was both paraphrased in a memorandum to the Secretary and attached in full as an addendum to that memorandum. The Secretarial Issue Document noted the state court opinion, but concluded that sufficient other state law protections existed to satisfy the permanent administration requirement under the federal act. The record thus belies the contention that the state court opinion was not considered. In the absence of clear evidence to the contrary, courts presume that public officers properly discharge their duties, including reading memoranda addressed to them.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. The court of appeals correctly ruled that the Secretary's designation should not be set aside, concluding that the allegedly "premature" publication of the Notice of Availability in the Federal Register did not deprive any interested party of his right to comment on the EIS. In *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978), and *Baltimore Gas & Electric Co.* v. *NRDC*, 462 U.S. 87 (1983), this Court explained that agency action may be reversed only for substantial procedural defects that prevent the public "from making as full a presentation as desired" (462 U.S. at 108). No such defect infected the EIS process in this case; indeed, petitioners have admitted as much by defining the "prejudice" to their interests as the identity of the decisionmaker (84-544 Pet. 26-27; 84-553 Pet. 19-20). The court of appeals correctly held that this "interest" is not protected by NEPA's procedural provisions (Pet. App. A5):

> The irregularity in filing the notice before circulation * * * had no effect whatsoever on [petitioners'] opportunity to review the EIS after publication of the notice; nor did it affect the opportunity of the interested agencies and members of the public to review the statement for 30 days following publication. The "premature" publication about which [petitioners] complain is significant only because delay of a week in publication would have prevented the matter from being decided by Secretary Andrus rather than by his successor.

The court of appeals also correctly concluded that any deviation from CEQ's timing regulations was "trivial" within the meaning of those regulations. In anticipation of just this type of lawsuit, the CEQ regulations provide that "[i]t is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action" (40 C.F.R. 1500.3).[4] Similarly, the Administrative Procedure Act, 5 U.S.C. 706, directs courts not to become embroiled in quibbles about agency action unless the error is "prejudicial." No such error occurred in this case. Petitioners never argued that the timing of the Secretary's decision actually precluded them from presenting any relevant information to the Secretary or that they were in any way prejudiced.[5] In short: "The integrity of the decisionmaking

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[4]The court of appeals properly deferred to CEQ's interpretation of its own regulations. See *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979). Moreover, as explained in the declaration of William Hedeman, Director, Office of Federal Activities, EPA, the procedure for filing and distributing EISs and publishing Notices of Availability that was followed in this case has been employed frequently by EPA. The Hedeman declaration explains that the intent of the CEQ regulations is fully satisfied so long as the FEIS is available to the public at the time the Notice of Availability is published. Petitioners do not dispute that the FEIS in this case was in fact available on the December 17 publication date.

[5]Notwithstanding petitioners' allegations of political improprieties (84-544 Pet. 26-27; 84-553 Pet. 19-20), we note that the district court rejected the contention that political motivations undermined the objectivity of the decisionmaking process (Pet. App. A28), and the court of appeals did not disturb that finding.

process within the government and the public's opportunity to comment in accordance with all legal requirements were not compromised in any way" (Pet. App. A7).

2. The court of appeals properly reversed the district court's second reason for overturning the Secretary's decision, namely, that the "full import" of the California state court decision had not been brought to the Secretary's attention when he made his decision. The district court's ruling was wrong for at least three reasons. First, as the state court itself recognized (Pet. App. A186-A187), whether the State of California can satisfy the "permanent administration" requirement of the federal Wild and Scenic Rivers Act is a matter of federal, not state, law. The Secretary's interpretation of the state court's analysis of the term "permanent administration" (which the state court itself recognized as dictum) amounted to the interpretation of federal law he was entrusted to administer, and, as such, was entitled to deference. See, *e.g., Chevron U.S.A., Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip. op. 6-7.[6] Second, that portion of the state statute requiring legislative approval of river management plans (upon which the state court's dictum

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[6]Although petitioners deny that the Secretary had any discretion to determine the weight to be accorded the state court decision, the *Evaluation* (at 1) clearly explains the discretionary nature of the Secretary's decision on the "permanent administration" requirement:

> No State can make an irrevocable commitment that a particular river will remain in a State system forever. Because each State, as an element of its sovereignty, reserves the option to amend, modify, or repeal a river designation, the "permanent" standard of the Federal law must be viewed in this relative, rather than absolute context. It follows that the permanency of a State's commitment is a matter for the exercise of reasoned, discretionary judgment by the Secretary of the Interior.

This analysis also disposes of petitioners' contention (84-544 Pet. 14-16; 84-553 Pet. 15 n.5) that the California legislature's designation of the Eel River was too conditional to satisfy the standards of the federal statute.

rested) was repealed on September 27, 1982, by California Assembly Bill No. 1349 (Pet. App. A111-A113); hence, this issue had already become moot before the district court invalidated the Secretary's decision.[7] Third, as the court of appeals recognized, the Secretary was presented with the state court decision; he concluded, however, that other provisions of state law provided adequate protection to satisfy the "permanent administration" requirement imposed by federal law (Pet. App. A10; see pages 5-6, *supra*).

3. Finally, petitioners' challenge (84-544 Pet. 27-29; 84-553 Pet. 20-23) to the propriety of the court of appeals' grant of summary judgment to the government on all issues, including the adequacy of the FEIS, raises no issue warranting intervention by this Court. The full administrative record, including the FEIS, was before the Ninth Circuit, and that court was fully able to gauge whether plaintiffs' NEPA challenges were substantial or whether the issue of NEPA compliance was being used as a "tactic of litigation and delay." *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 384 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (footnote omitted). See, *e.g.*, *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 470 F.2d 289, 301 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973), in which the court stated:

> Ordinarily, we would remand the matter to the trial court for such review, but it is not necessary to do so in

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[7]In deleting the requirement for river management plans from the state statute, the California legislature specified (Pet. App. A139) that its action was not to affect this litigation. But it was of course not open to the state legislature to attempt to override the strictures of Article III of the Constitution. And even if one were to assume that a case or controversy survived the amendment of the state statute, the exercise of this Court's certiorari jurisdiction to review the relationship between a discretionary federal decision and a state statute no longer in existence clearly is not warranted.

this case. The complete record, including the environmental impact statement and the transcript of the proceeding below, is before us. We have reviewed the record thoroughly and are convinced that even if all factual disputes are resolved in favor of the plaintiffs, the decision of the Corps to complete the dam cannot be set aside as arbitrary and capricious.

No different result is called for in the instant case.[8]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[8]Petitioners' attempt (84-544 Pet. 20-21; 84-553 Pet. 1) to inject a Tenth Amendment claim into this case is unavailing for it was not raised before the district court or the court of appeals. See, *e.g.*, *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975). In any event, it is clear that the secretarial designation made at the specific request of the Governor of California raises no Tenth Amendment issue.

DOJ-1984-12